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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 269

HARRY F. RUSSELL, Judge of the Circuit Court of the City of St. Louis, Missouri,

Petitioner,

vs.

THE STATE OF MISSOURI, at the Relation of St. Louis-San Francisco Railway Company, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, AND SUPPORTING BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 269

HARRY F. RUSSELL, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI,

Petitioner,

vs.

THE STATE OF MISSOURI, AT THE RELATION OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION,

Relator-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Petitioner prays that the Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Missouri entered in the above-entitled cause March 14, 1949, granting a Writ of Prohibition against petitioner as Judge of the Circuit Court of the City of St. Louis, Missouri, at the relation of the St. Louis-San Francisco Railway Company (R. 71).

Summary Statement

Under the carrier's designation "trainporter", Negroes had been doing *all* the head-end braking work and some baggage- and mail-handling work for more than 40 years

on the passenger trains of the St. Louis-San Francisco Railway Company to which they were assigned (R. 30).

On May 9, 1948, the carrier posted a Notice that on Trains 9 and 10 effective May 14, 1948, the "trainporter's" position would be abolished and their head-end braking functions transferred to white men, members of the Brotherhood of Railroad Trainmen, under the job designation "brakeman-baggageman" (R. 32). Negroes could not be employed as "brakeman" or "brakeman-baggageman" on the St. Louis-San Francisco Railway because of a restrictive agreement dated March 14, 1928, between the carrier and "the four train service organizations" (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) that

> "effective March 14, 1928, in the future hiring of employes in train, engine and yard service but not including train porters, only white men shall be employed" (R. 45-47; Appdx. hereto).

Two Negro "trainporters", Bagley and Tillman, sued in the Circuit Court of the City of St. Louis, to prevent the transfer of their head-end braking functions to white men, members of the Brotherhood of Railroad Trainmen, and to prevent a reclassification of their job functions along racial lines, etc. (R. 4-10; 32).

After notice and hearing, petitioner as Judge of the Circuit Court of the City of St. Louis, issued a temporary injunction, providing among other things, against the transfer of said functions or racial reclassification of plaintiffs' jobs (R. 13-14).

The relator carrier sought a Writ of Prohibition in the Supreme Court of Missouri, alleging that the controversy presented a jurisdictional labor dispute, to be decided by the administrative Boards set up under the Railway Labor Act (45 U. S. C. sections 153, 154-5) (R. 3-16).

In his Return to the Preliminary Rule in Prohibition (R. 26-69) petitioner denied the controversy was a labor dispute over jurisdiction between two crafts, and asserted it involved racial discrimination in job rights and civil rights; pointed out that the National Mediation Board lacked jurisdiction to adjudicate the issues, and that as the Negroes were trainmen the First Division of the National Railroad Adjustment Board had exclusive jurisdiction, if any, but was an unfit administrative tribunal for submission of the issues because

(1) the First Division is composed of ten members: five carrier representatives and five labor representatives—all of whom are paid for their services on the Division by the parties they represent and who hold office for no fixed term but at will. The five labor representatives come one each from the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen, Order of Railway Conductors and Switchmen's Union of North America. All five of these unions bar Negroes from membership solely because of race (R. 33-34).

(2) Four of the five unions (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) have a record extending more than 20 years of implacable hostility and persistent efforts to drive Negro train- and enginemen out of the service of *this very carrier* by discriminatory agreements, strike threats and other pressure (R. 31, 32, 40, 45-47, 61-62, 63-66; 83-84).

(3) the Brotherhood of Railroad Trainmen is directly interested in the outcome of the dispute, as its members stand to spread their employment if the decision of the First Division should be adverse to the Negroes (R. 7).

Petitioner stated that the Writ of Prohibition would obliterate plaintiffs' rights under the Federal Civil Rights Act (8 U. S. C. sections 41 and 43) and under the Railway Labor Act; would deprive them of equal protection and due process guaranteed by the XIV Amendment to the Constitution of the United States, and make them submit their claims to retain their employment to the First Division of the National Railroad Adjustment Board, which is so geared and manned as to deprive them of due process of law guaranteed under the V Amendment (R. 35-36).

The Missouri Supreme Court issued its Writ of Prohibition against petitioner's making any determination concerning jurisdiction, classification or representation issues, or declaring plaintiffs' status as to any position or job function (R. 71-72). Motion for rehearing was overruled (R. 81-90).

Salient Facts To Be Considered

Bagley and Tillman, Negro "trainporters" employed by relator carrier, filed their bill in equity against the carrier in the Circuit Court of the City of St. Louis, (1) to prevent the carrier's arbitrarily reclassifying plaintiffs' head-end passenger braking jobs and braking functions under a job nomenclature, under which Negroes could not be hired or used because of a certain restrictive agreement dated March 14, 1928, made by the carrier and the "four train service organizations" (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) that

> "effective March 14, 1928, in the future hiring of employes in train, engine and yard service but not including train porters, only white men shall be employed." (R. 45-47; also Appendix hereto);

(2) to prevent the carrier's arbitrarily transferring their head-end passenger braking functions to white men, mem-

bers of the Brotherhood of Railroad Trainmen; and (3) to protect their jobs and civil rights as citizens (R. 4-10).

The bill alleged that for many years Negroes had been functioning as head-end passenger brakemen, doing *all* the head-end braking work, plus additional minor duties; but that solely because of race and to exploit them economically the carrier had never classified them or paid them brakeman's pay, but had denominated them "trainporters" and paid them less than standard brakeman's pay (R. 4). During World War I the United States Railroad Administration established certain functional tests to determine the classification of passenger brakemen (Supplement 12 to General Order No. 27, U. S. RR. Administration, December 2, 1918, R. 44). With no variation in duties the Negro "trainporters" met all these functional tests, qualified under the Supplement as passenger brakemen, were so classified and paid standard brakeman's pay as long as the railroads continued under Federal control. When the railroads were returned to private management, relator carrier February 1921, reclassified the Negro passenger brakemen as "trainporters" and cut back their pay.

The bill further alleged that Negroes are barred because of race from the white brakemen's organization (the Brotherhood of Railroad Trainmen), and that although the Brotherhood has recognized the head-end passenger braking functions performed by the Negroes are brakemen functions, it refuses to bargain collectively for the Negroes because of the fiction dubbing Negro head-end passenger brakemen "trainporters"[1] (R. 4-5).

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[1] Head-end braking duties constitute 90% of the "trainporters" functions; cleaning coaches and assisting passengers about 10% (R. 32). White men are never classified as trainporters. White brakemen relieving Negro trainporters and taking over their runs on either a temporary or permanent basis, who do all the work trainporters do except the occasional sweeping of the coaches en route, are still called "brakemen" (R. 31).

The bill also alleged that many Negro head-end passenger brakemen under the job title "trainporter" had handled baggage on baggage cars as part of their brakemen's functions (R. 6).

The bill further alleged that despite plaintiffs' experience and qualifications on May 9, 1948, the carrier posted a Notice that on May 14, 1948, plaintiffs' jobs on Trains 9 and 10 would be abolished, their head-end braking functions turned over to white men, members of the Brotherhood of Railroad Trainmen, under the job nomenclature "brakeman-baggageman", and their remaining minor functions assigned to chair car porters[2]—this in spite of the fact that under the designation "trainporters" plaintiffs had been doing *all* the head-end braking work and some baggage work on Trains 9 and 10 (R. 7).

The bill further alleged that the carrier had refused to consider the Notice as a change in working conditions entitling plaintiffs and others similarly situated to 30 days notice under the Railway Labor Act or to the benefits of mediation. Plaintiffs averred they lack an adequate remedy at law or administrative remedy; that the National Rail-

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[2] On March 7, 1946, under strike threat and pressure from the Brotherhood of Railroad Trainmen, the St. Louis-San Francisco had attempted to abolish the position of "trainporter" completely, and replace the Negroes with white workers classified as "brakemen", not because of any complaint about the Negroes' work but solely because of color. (R. 32, 40).

This move of the Brotherhood on the St. Louis-San Francisco was part of a larger campaign on the part of the Brotherhood to take the head-end braking jobs away from the Negroes. As to the Atchison, Topeka & Santa Fe Railway, see *Hunter* v. *Atchison, T. & S. F. Rwy. Co.*, 171 F. 2d 594 (7th Circ., 1948); as to the Missouri-Kansas-Texas Railroad see *M-K-T R. Co.* v. *Randolph*, 164 F.2d 4 (8th Circ., 1947).

The Brotherhood did not demand in haec verba the discharge of the Negro "trainporters". It demanded that their head-end braking functions (which represented 90% of their job) be turned over to white brakemen. The effect of the Brotherhood demand was characterized by the Court of Appeals for the Seventh Circuit in the *Hunter* case, *supra*, as being the same as if the Brotherhood had expressly demanded the Negroes' discharge. 171 F.2d 594, 597.

road Adjustment Board had no jurisdiction, or if so was a body so constituted that due process of law could not be afforded plaintiffs and other Negroes in their complaint (R. 8). For themselves and all Negroes similarly situated they prayed for an injunction against their discharge as head-end brakemen and the transfer of their head-end braking functions to white men; for an end to the wage and working discriminations they were suffering because of race; that job functions, not fictitious job titles, should control working conditions, rates of pay and classifications; that they be permitted to function as brakemen-baggagemen, their seniority rights protected, and no bids entertained based on the May 9, 1948, Notice for "brakemen-baggagemen" on Trains 9 and 10 (R. 9-10).

After notice and hearing, petitioner as Judge of the Circuit Court of the City of St. Louis, issued a temporary injunction against the carrier's

> "displacing Plaintiffs and others similarly situated from their job functions as head-end brakemen with white brakemen, or from taking away from them on any trains their present job functions as brakemen, or from taking job functions or employment opportunities away from Plaintiffs and others similarly situated and reassigning the same functions to white persons under a discriminatory racial employment policy, or from giving said functions job nomenclatures that arbitrarily exclude Negroes, because Negroes are not employed under the nomenclatures adopted, or from entertaining any bids for baggagemen-brakemen, based on the posted notices referred to in evidence with reference to trains No. 9 and No. 10, or from refusing to hire or use qualified Negroes to fill job vacancies as baggagemen or so-called baggagemen-brakemen, irrespective of organization affiliation, or absence thereof . . ." (R. 13-14).

Relator carrier applied to the Missouri Supreme Court for a Writ of Prohibition alleging the controversy presented

a jurisdictional labor dispute, and that under the Railway Labor Act, jurisdiction to hear and determine the dispute was vested in the Boards thereby established (R. 14).

In his Return to the Preliminary Rule in Prohibition petitioner denied the controversy was a jurisdictional labor dispute and asserted it involved property rights and civil rights (R. 27); and the right of the Negro plaintiffs to equal protection of the law in following a common calling against schemes of racial discrimination dating back to 1921 (R. 29-30). He stated that Negroes had been performing *all* braking services and some baggage and mail handling service on the head end of relator's passenger trains for 40 years, and recited the salient facts in the Bagley bill set out above (R. 30-32).

The Return, in reference to other matters adduced before the petitioner, continued:[3]

> "(i) Petitioners, although Negroes, were and are trainmen, so designated and treated by Relator. They functioned as head end brakemen, were subject to the same examinations, exactions and discipline as white passenger brakemen, and attended the same transportation and safety classes as the white brakemen.
>
> "(j) Under the Railway Labor Act the First Division of the National Adjustment Board has jurisdiction over certain disputes between carriers and their train-

[3] Under Missouri law all well pleaded allegations in the Return must be taken as true, and averments in relator's petition for the Writ which are specifically denied by the Return must be treated as false.

State ex rel. v. *Shelton*, 238 Mo. 281, 286;

State ex rel. v. *Shields*, 237 Mo. 229.

The question whether the court is acting within its jurisdiction is to be determined from the allegations in the pleading in the case pending before the lower court and the evidence considered by the Judge thereof; and not from "facts" which the relator injects dehors the record.

State ex rel. v. *Wall*, 297 Mo. 594, 600;

State ex rel. v. *Joynt*, 341 Mo. 788.

. . . . .

men. The First Division consists of ten members; five carrier members and five labor members coming from unions National in scope. Each member of the First Division receives his compensation for services on the Board from the party he represents, and his compensation at all times remains wholly subject to the control of said party (45 U. S. C. sec. 153).

. . . . .

"(l) The five labor members on the First Division come one each from the Brotherhood of Railroad Trainmen, the Switchmen's Union of North America, the Order of Railway Conductors, the Brotherhood of Locomotive Engineers, and the Brotherhood of Locomotive Firemen & Enginemen; and receive their compensation for services on the First Division from their respective organizations. All five organizations bar Negroes from membership solely because of race.

"(m) . . . since a decision against the petitioners would immediately increase the job opportunities and benefits to the members of the Brotherhood of Railroad Trainmen, its member . . . (is) directly interested in the subject matter of the dispute, adverse to the interests of petitioners, and . . . disqualified to vote thereon. This disqualifies the First Division, as the Railway Labor Act requires cases to be decided by the votes of all the members of the Division (45 U. S. C. sec. 153).

"(n) The First Division of the Adjusted Board is disqualified to act and is not an adequate administrative tribunal in the present dispute under Steele *v.* L. & N. R. Co., 323 U. S. 192, and Tumey *v.* Ohio, 273 U. S. 510, 71 L. Ed. 749, 50 A. L. R. 1243.

"(o) The Adjustment Board could not grant injunctive relief pending the slow and tortuous processing of cases. The First Division is so far behind in its docket (2800 cases pending and 2 years behind in its docket)

that the delay in enforcing plaintiff's rights by reference to the First Division would work irreparable injury upon them and others similarly situated and amount to a denial of rights and confiscation of property without due process or equal protection of law.

"(p) It was further shown that controversies under the Railway Labor Act (45 U. S. C. sec. 151 et seq.) are cognizable in state courts. Steele *v.* L. & N. R. Co., 323 U. S. 192; Betts *v.* Easley, 161 Kan. 459, 169 P2d 831; Dooley *v.* Lehigh Valley R. Co., 131 N. J. Eq. 468, 25 A2d 893" (R. 33-35).

The Return then stated that the Writ of Prohibition would deprive plaintiffs of due process and equal protection of law under the XIV Amendment to the Constitution of the United States, and would

"also illegally fasten on them administrative machinery under the Railway Labor Act (45 U.S.C. section 153) so geared and manned as to deprive them of the equal protection of the law guaranteed them by the Federal Civil Rights Act (8 U.S.C. sec. 41) and the due process of law guaranteed them by the 5th Amendment to the Constitution of the United States." (R. 35-36; italics supplied.)

All points made in the Return were briefed and argued before the Missouri Supreme Court. Nevertheless the Supreme Court March 14, 1949 made its Writ of Prohibition absolute

"insofar as it prohibits respondent from making any determination or order concerning jurisdiction, classification or representation issues involved in the case of J. V. Bagley and Cleveland Tillman, plaintiffs, *versus* St. Louis-San Francisco Railway Company, a corporation, defendant, No. 19130D, or from declaring plaintiffs' status as to any position or job functions;" (R. 71.)

and dissolved the temporary injunction

> "except as to enjoining the taking away from the plaintiffs their present job functions on any trains or replacing them with baggagemen-brakemen, which may be continued pending determination of the jurisdictional, classification and representation questions by the Board established by the Railroad Labor Act or for a reasonable time to invoke the jurisdiction of the Boards". (R. 71-72.)

In its opinion, which contains many references to "facts" dehors the record, the Missouri Supreme Court stated:

> ". . . Neither does that fact (color) entitle them to by-pass the Boards established by Congress for the settlement of such disputes, according to the recent decision of the United States Court of Appeals, Fifth Circuit, in Hampton *v.* Thompson, 171 Fed. (2d) 535 . . . In effect, our courts of equity are invoked to decide issues of classification, representation and job disputes on the ground that the members of the National Mediation Board *, appointed by the President of the United States, and *the members of the National Railroad Adjustment Board, designated as provided by Congress,* would be incapable of acting in good faith and without racial discrimination, before they have ever considered the matters involved; and to say that the methods provided by Congress to settle such questions are inadequate and improper . . ." (R. 80; italics supplied.)

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* (Our footnote) Petitioner did not charge racial hostility or interest against any member of the National Mediation Board, but did argue to the Missouri Supreme Court that the National Mediation Board had only a very narrow jurisdiction as a fact-finding body: that it could make a definitive definition of the limits of "craft" or "class" only as incident to a representation dispute. 45 U.S.C. 152-Ninth. No representation dispute was raised in the case pending before petitioner; the Brotherhood of Railroad Trainmen was not joined, was not asked to represent the Negro trainmen or to cease from misrepresenting them. Bagley and Tillman pitched their case solely against their employer carrier.

In his Motion for Rehearing (R. 81-90) petitioner urged among other things, that the Missouri Supreme Court had failed to consider

> "the incontrovertible and admitted fact that the reclassification of jobs by Relator on trains 9 and 10 was not functional but deliberately done (as other acts of the Relator) on the basis of race or color to disqualify the Negro train porters (Negro passenger brakemen)[4] solely because they were Negroes (Respondent's Appdx, pp. 5, 6, 7, 8; 20, 21; Respondent's Brief, pp. 19-21, 22-25, 39-43)" (R. 81-82);

that the Court had overlooked the fact

> "the National Mediation Board is a board whose jurisdiction to determine craft or class is limited to such determination as an incident to a representation dispute. *No representation dispute* was involved in the case below. (brief page 17) . . . (R. 82);

that the Court failed to consider

> ". . . the undenied and undeniable fact of implacable hostility of the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen & Enginemen, the Order of Railway Conductors, and the Brotherhood of Railroad Trainmen to the use of Negroes in train, engine and yard service on *this* relator carrier's property. These four unions have representatives on the First Division of the National Railroad Adjustment Board, which has exclusive jurisdiction over disputes between carriers and their trainmen. 45 U.S.C. sec. 153 First (h). Negro train porters on the Frisco are trainmen (Appdx. 8). Since March 14, 1928 these four unions have been on record that
>
> > 'colored employees cannot render the intelligent service necessary to safe operation in train, engine and yard service' (Appdx. 20).
>
> Further in 1940 the Brotherhood of Locomotive Fire-

[4] R. 30, 31, 32, 33; 45, 46.

men & Enginemen attempted to drive all the Negro locomotive firemen on the *Relator's* property out of service (Appdx. 36-37), and in 1941 negotiated the Southeastern Carriers Conference Agreement which arbitrarily restricted jobs of Negro firemen on the ground of race (Appdx. 39-44; Steele *v.* L. & N. R. Co., 323 U. S. 192). Further in 1946 the Brotherhood of Railroad Trainmen forced the *Relator* to try to abolish the position of train porter and throw the Negro train porters out of work (Appdx. 7-15). All five unions having labor members on the First Division (the four 'Big-Four Operating Brotherhoods', *supra,* plus the Switchmen's Union of North America, make up the five union representatives comprising 50% of the total ten members on the First Division) bar Negroes, otherwise qualified, from membership solely because of race . . . that this hostility on the part of all said five unions is such that to force Negro train porters to submit their present dispute with the carrier before the First Division of the National Railroad Adjustment Board, where 50% of the members come from said five unions, and deny them a judicial determination of their dispute in the state court violate:

> (1) the due process and equal protection clauses of the XIV Amendment of the Constitution of the United States;
>
> (2) the due process clause of the V Amendment to the Constitution of the United States;
>
> (3) the equal protection clauses of the Federal Civil Rights Act (8 U.S.C. sec. 41) which expressly gives the victim a judicial remedy (8 U.S.C. sec. 153) . . .'' (R. 83-84; italics supplied.)[5]

The Motion further renewed the objection that the First Division was not an adequate administrative body under *Steele* v. *L. & N. R. Co., supra,* and that the Brotherhood

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[5] Appdx. 8 is R. 33; Appdx. 20, R. 45; Appdx. 36-37, R. 61-62; Appdx. 39-44, R. 64-69; Appdx. 7, 15, R. 32, 40.

of Railroad Trainmen member on the First Division was disqualified for interest within *Tumey* v. *Ohio, supra;* that plaintiffs in the *Bagley* case were not litigating as union members but as citizens, and that the case was "not a controversy between Unions but between Negro workers and an employer charged with unfair employment practices based on color and race" (R. 86); that plaintiffs did not claim exclusive right to the head-end braking functions, but maintained that although functionally they were brakemen they were denied their rights as brakemen solely because of race; that the Missouri Supreme Court had failed to consider point XII of petitioner's brief which stressed the fact

> "that this racial discrimination, eliminating citizens from following a common calling solely because of race was imposed by a railroad corporation, a quasi-public corporation a creature of the State of Missouri, enjoying governmental prerogatives and subject to governmental regulation to such an extent that constitutional restraints against race discrimination apply both under the due process and equal protection clauses of the V and XIV Amendments; the carrier by this racial discrimination had deprived Negro citizens of the equal right to contract and acquire property, and to the equal protection of the laws guaranteed them by the Federal Civil Rights Act (8 U.S.C. sec. 41) for which a judicial remedy is specifically provided (8 U.S.C. sec. 43) Brief pp. 10, 11, 20-21, 26-30, 37-39)." (R. 89-90.)

The Missouri Supreme Court overruled the Motion without comment. (R. 90.)

Jurisdiction

The judgment of the Missouri Supreme Court was rendered March 14, 1949, Petitioner's Motion for Rehearing, duly filed, was overruled April 11, 1939.

The time to file this petition was extended to August 15, 1949 by this Court July 8, 1949.

Jurisdiction to review the judgment is invoked under Title 28, U.S.C. section 1257 (3).

Questions Presented

1. Does the Writ of Prohibition issued herein by the Supreme Court of Missouri deny plaintiffs who were before petitioner due process and equal protection of the laws guaranteed them by the XIV Amendment to the Constitution of the United States, because

A

It forces them to submit their claim to retain their head-end braking functions to the First Division of the National Railroad Adjustment Board, which is an unfit administrative tribunal for purposes of this controversy in that

1. The official union policy of the five unions (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen, Order of Railway Conductors and Switchmen's Union of North America) having representatives on the First Division, who are also on the respective union payrolls for their services on the First Division, is anti-Negro and bars Negroes from membership in the union solely because of race;

2. Four of the five unions *supra* (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) through joint action obtained a contract March 14, 1928 with this very carrier,[6] specifically

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[6] In 1947 5 Negro train and engine service employees sued the St. Louis-San Francisco R. Co. and the four unions involved to cancel the 1928 Agreement, four million dollars damages and other relief. (*Tillman*

admitting implacable hostility toward the use of Negroes in train, engine and yard service on this very property in these words:

> "The four train service organizations have insisted and demanded for several years that St. Louis-San Francisco Railway Company have an understanding with them that in the future the Company would not employ any more Negroes in train, engine and yard service, but not including train porters. This demand and request upon the part of the organizations has been based upon the allegation . . . that colored employees cannot render the intelligent service necessary to safe operation in train, engine and yard service . . .
>
> "The responsibility for proposing and urging this agreement is fully assumed by the four train service organizations . . .
>
> "In accordance with the above it is agreed that effective March 14, 1928, in the future hiring of employees in train, engine and yard service but not including train porters, only white men shall be employed." (R. 45-47; Appdx. hereto.)

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et al v. *St. Louis-San Francisco R. Co. et al.*, U. S. District Court, E. D. Mo., Civil No. 5567). When the case was called for trial on May 23, 1949 the four unions rescinded the agreement. The Negroes refused to discontinue the case because they claimed it did not represent a change in policy, but merely a maneuver on the part of the unions to avoid a judicial decision in order to leave them free to pursue oppressive tactics on other railroads, and after the damage had been done and almost all the Negro firemen and brakemen on the St. Louis-San Francisco eliminated. Not a Negro fireman or brakeman had been hired on the St. Louis-San Francisco since March 14, 1928. Negroes are still excluded from membership in the unions in the territory served by the St. Louis-San Francisco.

The reason for stating the policy of union exclusion this way is that following the decision of this Court in *Railway Mail Association* v. *Corsi*, 326 U. S. 88, the unions amended their constitutions and by-laws to provide that the Negro exclusion rule should not apply in those states having legislation making exclusion of membership because of race illegal. No states in the territory served by the St. Louis-San Francisco have such laws. Further in states with such civil rights laws, Negroes are still excluded from membership through the device of the blackball, so that not a single Negro known and distinguished as such has broken through to become a member of any one of the big-four operating brotherhoods.

3. In 1940 the Brotherhood of Locomotive Firemen & Enginemen attempted to drive all the Negro locomotive firemen on the St. Louis-San Francisco Railway out of service (R. 61-62), and in 1941 negotiated the Southeastern Carriers Conference Agreement (which was declared discriminatory in *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 *supra*) arbitrarily restricting Negro firemen's jobs because of race;[7]

4. Although the Brotherhood of Railroad Trainmen by the contract of March 14, 1928 above had agreed to future hiring of trainporters by the St. Louis-San Francisco Railway Company, in 1946 by strike threat and other pressure it forced the carrier to try to abolish the position of "trainporter" completely and replace the Negroes with white brakemen, members of its union (R. 40, 7—paragraphs 9 and 10).

5. The Brotherhood of Railroad Trainmen's representative on the First Division is disqualified, not because of personal bias, but because of the anti-Negro record of his union and paymaster; and further because his union and paymaster is directly interested in the outcome of any decision which the First Division would make in the premises because its members' job opportunities would increase with

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[7] The Southeastern Carriers Conference Agreement of 1941 was never actually put in force on the St. Louis-San Francisco property because the March 14, 1928 agreement was more oppressive against Negroes than the 1941 Agreement; and under paragraph 5 of the Southeastern Carriers Conference Agreement:

> "It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions."

the Brotherhood of Locomotive Firemen & Enginemen elected to retain the 1928 Agreement which prohibited the hiring of *any* Negro fireman on the St. Louis-San Francisco property.

a decision adverse to the Negroes' claims to retain their head-end braking functions (*Tumey* v. *Ohio*, 273 U. S. 510).

6. The First Division is stymied by the disqualification of the labor representatives on the First Division for the reasons set forth above, and could not decide the controversy even if its jurisdiction were invoked, because all the members on the Division would not be eligible to participate in the final award, as required by the Railway Labor Act (45 U.S.C. section 153-First-n).

7. The First Division lacks the remedial powers to afford plaintiffs adequate and complete relief.

B

It denies plaintiffs their day in court on the issue of classification and refers them to the National Mediation Board which has no power to adjudicate who are members of a craft or class except incident to a formal representation dispute (45 U.S.C. section 152-Ninth). No representation dispute was involved in the case before petitioner.

II. Does the judgment of the Missouri Supreme Court obliterate the Federal civil right of the Negro head-end brakemen on the St. Louis-San Francisco Railway to the equal protection of their job contracts; and does it obliterate the right of judicial relief specifically given by Congress for the protection of Federal civil rights (8 U.S.C. sections 41 and 43).

III. Does a bill in equity lie by these Negro head-end brakemen on relator's property to prevent a threatened wrongful discharge, without prior recourse to the National Railroad Adjustment Board. (Cf. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.)

IV. Does the judgment of the Missouri Supreme Court establishing the National Railroad Adjustment Board as

the exclusive tribunal to determine whether these Negro trainmen shall retain their head-end braking functions on relator's passenger trains 9 and 10, impose on them a Federal administrative tribunal so unfit to receive, hear and decide the controversy that it deprives them of the equal protection of their right to follow a common calling guaranteed by the Federal Civil Rights Act (8 U.S.C. sections 41 and 43) and denies them due process of law as guaranteed by the V Amendment to the Constitution of the United States.

V. Can the St. Louis-San Francisco Railway Company, a corporation (quasi-public entity) incorporated under the laws of Missouri, enjoying sovereign prerogatives and subject to governmental regulation State and Federal—

A. discriminate in employment practices by setting up job nomenclatures for the work done satisfactorily by Negroes for over 40 years, in such manner as to disqualify Negroes from continuing in said jobs because of race;

B. deprive Negro employees of their equal right under Federal law to contract for their labor, and to have said contracts accorded equal protection of the law as compared to the legal protection given contracts by white employees for their labor.

VI. Can Congress withdraw protection of Federal civil rights and inherent civil rights from the courts, without providing an adequate substitute tribunal equipped and manned so as to afford complainants an impartial determination and complete relief.

Provisions of Constitutions, Treaties and Statutes Involved

The Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, the Charter of the

United Nations, Articles 55 and 56, the Federal Civil Rights Act (8 U. S. C. sections 41 and 43), and the Railway Labor Act (45 U. S. C. section 151 *et seq.*) are specifically involved in the consideration of this case. Pertinent extracts are copied in the Appendix hereto.

Reasons for Granting the Writ of Certiorari

I. The Missouri Supreme Court has decided a Federal question of substance and national significance, not heretofore determined by this Court and contrary to the trend of the decision of this Court, in holding that the Railway Labor Act makes it mandatory for the Negro head-end brakemen ("trainporters") on the St. Louis-San Francisco Railway to submit their claim to retain their head-end braking functions to the First Division of the National Railroad Adjustment Board for decision, when all the labor representatives on the First Division come from unions which bar Negroes from membership because of race and draw their salaries from such unions for their services on the First Division; when four of the five unions having representatives on the First Division have a persistent record of implacable hostility to the use of Negroes in train, engine and yard service on the St. Louis-San Francisco Railway property; and when one of the unions (the Brotherhood of Railroad Trainmen) is directly interested in the outcome of the controversy because its members stand to get increased job opportunities if the decision is adverse to the Negro "trainporters" (See *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, *Tumey* v. *Ohio*, 273 U. S. 510).

II. A decision by this Court will establish a uniform rule of decision and prevent a multiplicity of actions, because the question of the right of the five labor representatives on the First Division to participate in a controversy where Negro trainmen or enginemen are claiming racial discrimination

against their contract rights has been raised (a) in the following cases now pending in trial courts and undisposed of:

1. *Tillman* v. *St. Louis-San Francisco R. Co.*, U. S. District Court, E. D. Mo., Civil No. 5567—hearing on the merits concluded, waiting argument in the District Court;

2. *Bibbs* v. *St. Louis-San Francisco R. Co.*, Circuit Court of the City of St. Louis, Mo., No. 22806-D, Div. No. 2—temporary injunction against discharge of Negroes issued, awaiting disposition of present case before further action;

3. *Griffin v. Illinois Central R. Co.*, U. S. District Court, N. D. Ill., Civil No. 48 C 444: pending on motions to dismiss by the Brotherhood of Locomotive Engineers *et al.*;

and (b) in the following cases now pending before the First Division itself:[8]

1. *Colored Trainmen of America* v. *St. Louis, Brownsville & Mexico R. Co.*, File S-577;

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[8] The challenge directly filed with the First Division itself raises questions of first impression for which counsel has been unable to find any precedents:

(a) if the First Division denies the challenge, since the award of the First Division is not subject to judicial review except it be a money award, the action of the Division will have to be attacked collaterally by the extraordinary writs.

(b) if the First Division upholds the challenge, or if the challenge is upheld thru the issuance of one of the extraordinary writs, how will the First Division then proceed? The only unions which can name representatives to the First Division under the rules promulgated by the Railway Labor Executives Association in 1934 that govern selection of labor members to the First Division, are the five unions now represented on the First Division. Since the challenge really goes to the anti-Negro bias and active hostility of said unions, any substitute representative named by the unions and paid by them for service on the First Division would be just as objectionable as the incumbents. Counsel submits that here one reaches a state of administrative frustration, calling for judicial relief to prevent obliteration of Federal civil rights and jobs rights established under the Railway Labor Act, Cf. *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 91 L. Ed. 471.

2. *Brotherhood of Railroad Trainmen* v. *Louisiana & Arkansas Railway Company*, File K-160.

3. *Brotherhood of Railroad Trainmen* v. *St. Louis-San Francisco R. Co.*, File No. 23994.

III. The judgment of the Missouri Supreme Court misconstrues the powers of the National Mediation Board, and ascribes to it powers of adjudication it does not possess under the Railway Labor Act.

IV. The judgment of the Missouri Supreme Court through a misinterpretation of the Railway Labor Act imposes illegal restraints on judicial power to protect Federal and inherent civil rights to equal protection of the right to follow a common calling.

V. The Railway Labor Act as construed by the Missouri Supreme Court denies the Negro head-end brakemen on the St. Louis-San Francisco Railway their day in court and imposes on them a Federal administrative tribunal (the First Division of the National Railroad Adjustment Board) which is so geared and manned as to deny them equal protection of the laws as guaranteed by the Federal Civil Rights Act (8 U. S. C. secs. 41 and 43) and due process as guaranteed by the V Amendment.

VI. The effect of the judgment of the Missouri Supreme Court is to sanction racially discriminatory employment contracts and employment practices in interstate commerce by the St. Louis-San Francisco Railway Company, a railroad corporation which enjoys State and Federal sovereign prerogatives and is subject to State and Federal regulation to such an extent that it acts as a quasi-public entity and is subject to constitutional restraints against racial discrimination.

VII. The effect of the judgment of the Missouri Supreme Court violates a treaty of the United States: Articles 55 and 56 of the Charter of the United Nations, 59 Stat. 1031, 1045-1046.

VIII. The judgment of the Missouri Supreme Court thwarts the public policy of the United States which declares illegal employment contracts and practices under the Railway Labor Act which discriminate against workers engaged in interstate commerce by rail because of race or color.

Conclusion

It is respectfully submitted that the petition for the writ of certiorari should be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 269

HARRY F. RUSSELL, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI,

Petitioner,

vs.

THE STATE OF MISSOURI AT THE RELATION OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Opinions Below

The opinion of the Supreme Court of Missouri (R. 72-81) is reported in 219 S. W. 2d 340.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. section 1257(3).

The judgment sought to be reviewed was entered by the Supreme Court of Missouri on March 14, 1949. Petitioner's

Motion for Rehearing was overruled April 11, 1949. The time to file this petition for certiorari was extended to August 15, 1949, by order of this Court entered July 8, 1949.

Statement of the Case

The statement of the case and a statement of the salient facts from the record appear in the accompanying petition for certiorari.

Specification of Errors to be Urged

I. The Supreme Court of Missouri by issuing its Writ of Prohibition obliterated for plaintiffs Bagley and Tillman and others similarly situated all effective protection of their job rights under the Railway Labor Act (45 U. S. C. section 151 *et seq.*) and the Federal Civil Rights Act (8 U. S. C. sections 41 and 43), and deprived them of the equal protection and due process of law as guaranteed by the XIV Amendment to the Constitution of the United States.

II. The Railway Labor Act as construed by the Missouri Supreme Court is repugnant to the Federal Civil Rights Act (8 U. S. C. Sections 41 and 43); and unconstitutional as depriving plaintiffs Bagley and Tillman and others similarly situated of their vested job rights without due process of law, as guaranteed by the V Amendment to the Constitution of the United States.

Summary of Argument

The fundamental right of the Negro plaintiffs Bagley and Tillman and others similarly situated to retain their head-end braking functions on the passenger trains of the relator carrier (which Negroes had been performing for over 40 years), and to prevent the reclassification of their job-functions on racial lines aimed at disqualifying them and transferring their functions to white men, members of

the Brotherhood of Railroad Trainmen, is a common law right and a right under the Railway Labor Act broader than the narrower question of the identity of craft or class. The right is a vested property right coming within the protection of constitutional restraints and entitled to the equal protection of the law under the Federal Civil Rights Act (8 U. S. C. sections 41 and 43).

Under the Railway Labor Act an interstate carrier by rail (a public utility corporation enjoying sovereign prerogatives both State and Federal) cannot make distinctions in the classifications of its employees based on irrelevant and invidious distinctions of race for the purpose of eliminating its Negro employees from the service and transferring their job functions to white men, because of race.

Such irrelevant and invidious classifications do not involve jurisdictional disputes; or if so, involve jurisdictionl disputes only incidentally to the more fundamental violation of Federal civil rights and rights established under the Railway Labor Act.

The courts, State as well as Federal, have jurisdiction to enjoin and redress violations of the Railway Labor Act and to prevent the obliteration of rights guaranteed by Congress, such as under the Federal Civil Rights Act (8 U. S. C. section 41), to enforce which judicial relief is specifically provided (8 U. S. C. section 43).

The Missouri Supreme Court in issuing its Writ of Prohibition deprived these plaintiffs of their day in court, and relegated them for settlement of their dispute to the National Railroad Adjustment Board and the National Mediation Board.

The National Mediation Board lacks jurisdiction to adjudicate the issues here involved.

The National Railroad Adjustment Board lacks the power to afford complete relief; but above and beyond that, so

far as these plaintiffs are concerned, is an unfit administrative tribunal for the adjudication of the claims of racial discrimination here involved.

The Negro plaintiffs and others similarly situated are *trainmen*, and the First Division of the National Railroad Adjustment Board has exclusive jurisdiction over controversies between trainmen and carrier arising out of interpretation of working agreements.

The First Division has ten members: five carrier members and five labor members: all of whom are paid for their services on the First Division by the parties they represent, and who hold office not for a fixed term but at will.

The five labor members come one each from five railroad operating unions, all of which bar Negroes from membership solely because of race. In addition four of said unions with representatives on the First Division (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) have a record of implacable hostility and persistent efforts for more than 20 years to drive Negro train and enginemen out of the service of this very carrier by oppressive discriminatory agreements (*e.g.* contract of March 14, 1928), strike threats and other pressure, and to replace them with white workers. Moreover the Brotherhood of Railroad Trainmen is directly interested in the outcome of the dispute as its members would get increased employment if the decision of the First Division should be adverse to the Negroes.

Under *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 205, and *Tumey* v. *Ohio*, 273 U. S. 510, the First Division is disqualified to sit on the controversy. The decision of the Missouri Supreme Court making it mandatory for these plaintiffs to submit their claim to retain their head-end braking functions to the First Division of the National Railroad Adjustment Board for decision, so construes the Railway

Labor Act as to make it unconstitutional as depriving these plaintiffs of their vested job rights without the due process of law guaranteed by the V Amendment. The decision amounts to state action which violates the equal protection and due process clauses of the XIV Amendment.

The situation is then presented that the Circuit Court of the City of St. Louis, Missouri, had jurisdiction to prevent abuse of the Federal Civil Rights Act, to prevent a violation of the Railway Labor Act; and under any circumstances was presented with a situation of administrative frustration under the Railway Labor Act calling for exercise of the judicial function to protect property rights and civil rights. *Cf. Order of Railway Conductors* v. *Swan*, 329 U. S. 520.

The Writ of Prohibition illegally obstructed the exercise of jurisdiction by the Circuit Court of the City of St. Louis, and violated Federal statutory and constitutional rights of said plaintiffs.

Argument

I

The Circuit Court of the City of St. Louis had jurisdiction in the premises to determine whether the rights of the Negro plaintiff head-end brakemen ("trainporters") on the St. Louis-San Francisco under the Railway Labor Act and under the Federal Civil Rights Act had been violated; and if so, to protect them against such violations.

A

Under the Railway Labor Act Negro workers have the right to be free from employment contracts and employment practices discriminating against them on the basis of race or color.

Steele v. *L. & N. R. Co.*, 323 U. S. 192;

Brotherhood of Locomotive Firemen & Enginemen v. *Tunstall*, 163 F. 2d 289.

Judicial relief will lie to prevent violations of the Act, even though the dispute might involve the so-called germs of a jurisdictional labor dispute.

Hunter v. *A. T. & S. F. R. Co.*, 171 F2d 594.

The cases relied on by the Missouri Supreme Court in its opinion do not contradict this principle (R. 77). *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 had no racial elements in it, and the Order of Railway Conductors had and has its own representative on the First Division of the National Railroad Adjustment Board. In *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F2d 4, Randolph deliberately pitched his case on tortious interference with common law contract rights, not on a violation of the Railway Labor Act.

In *Hampton* v. *Thompson*, 171 F2d 535, the genesis of the dispute was not racial discrimination as is true here. The *Hampton* case arose out of a dispute over trackage rights: the right of brakemen of the San Antonio, Uvalde & Gulf Railroad to claim mileage for St. Louis, Brownsville & Mexico trains with St. Louis, Brownsville & Mexico crews run over San Antonio, Uvalde & Gulf rails. Further in the *Hampton* case plaintiffs were not able to show racial hostility against the Negro brakemen on *the very railroad property involved.*

Here the genesis of the case and its entire history stem from racial discrimination, and perversion of powers under the Railway Labor Act to accomplish same. The racial discriminatory agreement of March 14, 1928 (R. 45-47; Appdx. hereto), key-stone in the arch, is a perversion of the Railway Labor Act. The five day Notice of May 9, 1948 is a violation of the Railway Labor Act (R. 79). The reclassification of the Negroes jobs along racial lines to disqualify them is a perversion of the Act—a violation of the principle of the "open-shop policy" of the Railway Labor Act.

45 U.S.C. sections 151a, 152-Fourth, -Fifth,
40 Opinions Atty. General No. 49.

All this gave the Circuit Court jurisdiction to prevent the obliteration of rights conferred by Congress, even under the rule in the *Pitney* case, 326 U. S. 561, at 566.

State as well as Federal Courts have jurisdiction of issues arising under the Railway Labor Act.

Steele v. *L. & N. R. Co.,* 323 U. S. 192;
Betts v. *Easley,* 161 Kan. 459, 169 P2d 831;
Dooley v. *Lehigh Valley R. Co.,* 131 N.J. Eq. 468, 25 A2d 893.

B

The Federal Civil Rights Act guarantees Negroes equal protection of the law in following a common calling, and specifically provides judicial relief against violations of the Act.

8 U.S.C. sections 41 and 43;
Cf. *Hurd* v. *Hodge,* 334 U. S. 24.

There can be no doubt that if the Negro trainmen on the St. Louis-San Francisco Railway are compelled to present their claim to retain their head-end braking functions to the First Division of the National Railroad Adjustment Board where the five labor representatives come from the

Brotherhood of Locomotive Engineers,
Brotherhood of Locomotive Firemen & Enginemen,
Brotherhood of Railroad Trainmen,
Order of Railway Conductors,
Switchmen's Union of North America.

they have not been accorded equal protection of the law as compared with the submission to the First Division by a white Brotherhood of Railroad Trainmen member, of his

claim to such job functions. Therefore to see that the Negro plaintiffs received equal protection the Circuit Court had specific jurisdiction and authorization to proceed under 8 U.S.C. section 43.

C

Where race discriminations violating Federal constitutional restraints are involved the court is duty bound to make its own determination of the facts and law, to determine whether there has been a violation of the Federal right; and cannot be thwarted by the fact elements of a jurisdictional labor dispute might otherwise be present.

See *Norris* v. *Alabama,* 294 U. S. 587.

It is not even indispensable that the Federal question should have been expressly raised in the State Court (although it was here by petitioner's Return to the Preliminary Rule —R. 35), if the Federal question was necessarily involved in the decision and decided against the Federal right.

Murray v. *Charleston,* 96 U. S. 432, 441-2;
Eureka Lake Co. v. *Superior Court,* 116 U. S. 410, 415;
Kankanna etc. Co. v. *Green etc. Bay Co.,* 142 U. S. 254, 269.

The Circuit Court could not make its determination whether there had been a violation of the Railway Labor Act and the Federal Civil Rights Act without determining the issues of classification and job status and job functions. They are inevitably bound up with the decision of the Federal issues involved.

In the same manner, we are not in the shadow land where there are neither judicial nor administrative rights and where Congress has left solution of the problems involved to the processes of mediation and conciliation, or trial of

strength in economic warfare. *General Committee, B. L. E.* v. *Missouri-K-T R. Co.*, 320 U. S. 323, 337 (R. 76-77). We do not have two organizations contending against each other as in the *M-K-T* case, but two individual workers suing the carrier under the Railway Labor Act to prevent abolition of their jobs and transfer of their job functions because of color, contrary to the Railway Labor Act and the public policy of the United States. They claim protection of their individual *personal* rights.

See *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337, 351;
Mitchell v. *United States*, 313 U. S. 80, 97.

II

The Writ of Prohibition obliterated for plaintiffs all effective protection of their rights under the Railway Labor Act and the Federal Civil Rights Act and deprived them of equal protection and due process of law as guaranteed by the XIV Amendment to the Constitution of the United States.

It is established now beyond doubt that a judicial decision of the highest court of the state which violates constitutional restraints is state action within the meaning of the XIV Amendment to the Constitution of the United States.

Shelley v. *Kraemer*, 334 U. S. 1.

Here the state, through its Supreme Court of ultimate jurisdiction, has deprived plaintiffs below of their day in Court and denied them all effective protection of their rights under the Railway Labor Act and the Federal Civil Rights Act.

A

The First Division of the National Railroad Adjustment Board is unfit to pass on the present controversy.

The Adjustment Board down to the Railway Labor Act of 1934 was purely a creature of agreement between the carriers and their employees. The compulsive features of jurisdiction were imposed by the Act of 1934, which changed the character of the Board and its awards from the area of consent to government compulsion.

The 1934 Act sets up a permanent National Railroad Adjustment Board blanketing the industry, gives it statutory jurisdiction and makes its decisions final and binding on *both parties to the dispute,* except as to a money award. Yet the Act, after designating the Board to consist of 36 members, equally divided between carriers and "labor organizations of employees, national in scope," leaves the method of selection, term, amount of compensation up to the carriers and the "national labor organizations." (Section 3).

Unorganized employees and employees outside the "national labor organizations" are given no recognition and no chance to participate in the selection of Board members, although the railroad industry is expressly declared by the Act to be an open shop industry (Section 2-Fourth, -Fifth). The "national labor organizations" have dominated the First Division to such an extent that the Division long refused to accept and docket a complaint from an employee unless it was brought to the Division by the employee's craft representatives.

See *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, at p. 205, Monograph of the Attorney General's Committee on Administrative Procedure, Part 4: "Railway Labor, the National Railroad Adjustment Board, the National Mediation Board," at p. 7.

In contrast to the blank check given by the Act to the carriers and "national labor unions" regarding the composition of the bi-partisan National Railroad Adjustment Board (Section 3), the Act provides (Section 4) that the National Mediation Board shall consist of three members to be appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party, with fixed terms of office and salary.

It is therefore apparent that the First Division of the Adjustment Board set up by Statute in outline only and manned by members fifty percent selected by and from national labor unions barring Negroes from membership and with persistent anti-Negro records, cannot be permitted to be a "kangaroo court" sitting on and deciding cases adversely affecting the job rights of these outlawed Negro workers for the direct benefit of one or more of the unions represented on the Division. The action of the Division under such circumstances becomes prohibited governmental action which neither the members of the B R T nor the carrier can claim the benefit of.

Cf. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, *supra*.

What has been written should be law under any circumstances, but in the present case we have a record for more than 20 years duration of the four "train service organizations" persistently trying to drive Negro train- and enginemen out of service on *this very railroad* and replace them with whites under discriminatory agreements, strike threats and other pressure [R. 83-84].

Under such circumstances we submit it is not necessary to show personal bias on the part of the incumbent labor representatives on the First Division for proceedings before the First Division to be "coram non judice." No such

personal bias on the part of the judge had to be shown in *Tumey* v. *Ohio,* 273 U. S. 510, or on the part of the jurors in any of the jury cases where convictions of Negroes have been reversed because of systematic exclusion of Negroes from jury service because of race.

> See for example, *Norris* v. *Alabama,* 294 U. S. 587; *Akins* v. *Texas,* 325 U. S. 398.

If it be that on the record in this case it is still mandatory on the Negro head-end brakemen ("train porters") on the St. Louis-San Francisco Railway to submit their claim to retain their head-end braking functions to the First Division of the National Railroad Adjustment Board, confiscation is substituted for adjudication, and the Negro workers are condemned to a status of economic servitude.

This is particularly true, as the award of the First Division would be final and binding on the parties, and not subject to judicial review. (45 U.S.C. section 153 First-m).

B

The National Mediation Board is a board of conciliation and mediation. (45 U.S.C. sec. 155). It has no powers of adjudication, except where it is called upon to determine a dispute as to representation (45 U.S.C. section 152-Ninth) or where it is called upon to interpret a collective bargaining agreement negotiated under its auspices. (45 U.S.C. section 155-Second).

Negro brakemen or other operating employees are in no position to rely on the forces of conciliation and mediation. Their numbers are so small they have no bargaining position or economic power. According to the 1940 Census, vol. III, p. 88, Table 62, there were a total of 107,432 railroad brakemen in the United States, of which 2,739 were

Negroes; 43,851 locomotive firemen of whom 2,263 were Negroes.

Negroes must invoke not self-help but the protection of Government to secure their job rights in the railroad industry. For the reasons shown above it can only be done through the judicial process in protection of rights established for them as individual workers under the Railway Labor Act, the Federal Civil Rights Act, and the Federal Constitution.

III

The Railway Labor Act as construed by the Missouri Supreme Court is unconstitutional as depriving these Negro plaintiffs of their vested job rights without due process of law, as guaranteed by the V Amendment to the Constitution of the United States.

The reasons for this point have been set forth above in the petition for certiorari and this supporting brief. The point need not be considered unless two other points are first decided against petitioner: (1) that it is mandatory on plaintiffs to submit their claim to retain their head-end braking functions to the First Division of the National Railroad Adjustment Board; and (2) that unless said First Division is in position to make a finding and award adjudicating such rights plaintiffs are without legal remedy and relegated to the area of conciliation and mediation and economic warfare. Congress cannot withdraw all remedies for the protection of Federal rights, and leave the parties aggrieved nothing but the tolerance of the wrongdoers and the native ability of the parties aggrieved to self-help.

The constitutional question was raised in the *Steele* case (323 U. S. at 198). But the Court found it unnecessary to decide the constitutional question in view of its interpretation of the Act.

In the same way petitioner confidently expects that it will not be necessary to decide this case upon the constitutionality of the Railway Labor Act itself, but if so, then he presses to the hilt that the Act as construed by the Missouri Supreme Court imposes on these Negro plaintiffs a Federal administrative body as their exclusive tribunal for decision of their claim to retain their present jobs and functions under their existing working agreements, which administrative body (the First Division of the National Railroad Adjustment Board) is so geared and manned as to deprive them of vested rights without due process of law as guaranteed by the V Amendment.

In this connection the question is not how long they are entitled to have the jobs, the essential fact is they have them and contend for the right to retain them.

Truax v. *Raich*, 239 U. S. 33.

Conclusion

For the reasons given, it is respectfully submitted that this Court should issue its Writ of Certiorari to the Supreme Court of Missouri to review the judgment complained of, and upon hearing vacate the Writ of Prohibition improvidently and illegally heretofore issued.

Respectfully submitted,

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APPENDIX

Memorandum of Understanding of Responsibility for and Duties Under An Agreement Made Between the Four Train Service Organizations and the St. Louis-San Francisco Railway Company

The four train service organizations have insisted and demanded for several years that St. Louis-San Franciso Railway Company have an understanding with them that in the future the Company would not employ any more Negroes in train, engine and yard service, but not including train porters. This demand and request upon the part of the organizations has been based upon the allegation that colored firemen under arrangements prevent and make almost impossible opportunity for the training of white firemen to become engineers and limit their opportunities so to do; that colored employes cannot render the intelligent service necessary to safe operation in train, engine and yard service; that constant friction and irritation arises out of the whole situation and various other reasons.

The Railway Company has made known to the Organizations their very real apprehension and fears that in the event such an agreement was made the negroes in train, engine and yard service now in the employ of the Company, would be either intimidated, threatened or coerced into abandoning their positions or through indirect methods of false charges, repeated complaints, alleged infractions of rules, etc., would be driven from the service of the Company.

The responsibility for proposing and urging this agreement is fully assumed by the four train service organizations. The four train service organizations acknowledge and fully recognize the right of negroes now in the employ of the Company to the positions to which they are entitled under schedule rules and their right to fill these positions under fair and honest conditions without unfair action of any character being taken by the members of those organizations directly or indirectly for the purpose of compelling the abandoning of these positions or their elimination from

employment. The four train service organizations undertake that they can and will see to it that neither by nor through their membership is any advantage taken of this agreement in order to compel the abandonment of the positions now held by negro employes; that on the contrary, realizing the position of the management and their own assumption of responsibility, they will put forth every effort to see that conditions feared by the management shall not occur. It is the good faith of all parties that the present negro employes shall have fair and equal rights to remain in their positions, subject, of course, to the same measures of discipline and entitled to same impartiality of dealing.

Both parties shall co-operate together and use their best endeavors to carry this agreement into effect. In event that a situation shall arise which demonstrates lack of safety for colored employes or of unfair dealings with them this matter shall promptly be taken up with the train service organizations for the purpose of prompt and efficient prevention and correction. If it can be fairly shown thereafter that such conditions continue to exist then the Management reserves the right to hold itself released from the understanding entered into.

In accordance with the above it is agreed that effective March 14, 1928, in the future hiring of employes in train, engine and yard service but not including train porters, only white men shall be employed.

(Sgd.) J. W. Bowler,
General Chairman B. of L. E.
(Sgd.) Otis Embry,
General Chairman of B. of L. F. & E.
(Sgd.) L. S. Thompson,
General Chairman, O.R.C.
(Sgd.) F. W. Morey,
General Chairman B. of R.T.

(Sgd.) E. H. Kruse,
Ass't Grand Chief Engineer, B.L.
(Sgd.) Fred W. Lewis,
Vice President, B. of L. F. & E.
(Sgd.) J. A. Gannon,
Vice President, O.R.C.
(Sgd.) S. R. Harvey,
Vice President, B. of R.T.

(Sgd.) J. E. Hutchison,
Vice President—St. Louis & San Francisco Ry.

Witness—March 14, 1928.
Edwin P. Morrow,
Member Board of Mediation.

Extracts from Amendments to the Constitution of the United States

V Amendment.

". . . . nor shall any person be . . . deprived of life, liberty, or property, without due process of law; . . ."

XIV Amendment.

". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Extracts from Federal Civil Rights Act
8 U.S.C. Chap. 3

Sec. 41. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

* * * * * * *

Sec. 43. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

EXTRACTS FROM THE RAILWAY LABOR ACT, 45 U.S.C., CH. 8

(Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by Act of June 21, 1934, c. 691, 48 Stat. 1185)

Sec. 151 a. *General purposes*

The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Sec. 152. *General duties—Duty of carriers and employees to settle disputes*

* * * * * * *

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or con-

tributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefore, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * * * * * *

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all

disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of representatives; designation by Meditation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize

such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * * * * * *

Sec. 153. *National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards.*

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together

with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall

be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the divi-

sion as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall

not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice

chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such

regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

* * * * * * *

Sec. 155. *Functions of Mediation Board—Disputes within jurisdiction of Mediation Board*

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Interpretation of agreement

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * * * * * *

Sec. 156. *Procedure in changing rates of pay, rules, and working conditions*

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 269

HARRY F. RUSSELL, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI.
Petitioner

v.

THE STATE OF MISSOURI, AT THE RELATION OF ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

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In The

Supreme Court of the United States

October Term, 1949

No. 269

HARRY F. RUSSELL, Judge of the Circuit Court of the City of St. Louis, Missouri.
Petitioner

v.

THE STATE OF MISSOURI, at the Relation of St. Louis-San Francisco Railway Company, a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's brief opposes granting of the writ of certiorari on two grounds: (1) that the case presents a jurisdictional labor dispute, hence is not determinable by the courts; and (2) that "forebodings as to possible adverse decision if matter is submitted to the National Railroad Adjustment Board are not proper grounds for judicial review."

ARGUMENT

I.

The applicable decisions of this Court construing the Railway Labor Act as amended June 21, 1934, C. 691, 48 Stat. 1185, clearly establish jurisdiction of the Courts to determine the issues presented in this case.

In spite of the restrictions placed by the Railway Labor Act of June 21, 1934 on judicial relief, this Court has nevertheless been able to take jurisdiction to protect minority workers whose individual rights are opposed by the dominant railway labor union in the area of controversy.

Elgin, Joliet & Eastern R. Co. v. *Burley*, 325 U. S. 711;
Steele v. *L & N R. Co.*, 323 U. S. 192;
Tunstall v. *L & N R. Co.*, 323 U. S. 210;
Cf. Moore v. *Illinois Central R. Co.*, 312 U. S. 630.

Even the cases which restrict judicial relief provide that where constitutional considerations are involved, or there is a threatened sacrifice or obliteration of a right created by Congress to protect the interests of individuals or the public, a court of equity can intervene.

Switchmen's Union of N.A. v. *National Mediation Board*, 320 U.S. 297, 300-301
Order of Railway Conductors v. *Pitney*, 326 U.S. 561, 566

In the instant case the constitutional guaranty of due process is involved in forcing the Negro head-end passenger brakemen (called "trainporters" because of color) to submit their complaint to the First Division of the National Railroad Adjustment Board [1] for a definitive interpretation of their agreement and employment relation with the carrier in their claim to continue performing the head-end braking functions on respondent carrier's passenger trains.

Petitioner attaches as Exhibit A hereto, and asks the Court to take judicial knowledge thereof as a public document filed with a Federal agency under the Railway Labor

[1] Respondent does not challenge the Return to the Preliminary Writ in the Missouri Supreme Court that the Negro trainporters are "trainmen, so designated and treated by Relator" (respondent carrier) R.33. The Railway Labor Act expressly places trainmen under the jurisdiction of the First Division of the National Railroad Adjustment Board. Section 3 First (h) 45 U.S.C. sec. 153 First (h); petitioner's main brief, p.47.

Act, [2] of the rules adopted by the Railway Labor Executives Association in 1934 governing the selection and assignment of the labor members of the National Railroad Adjustment Board. These Rules show that the only labor organizations which can place members on the First Division are the five operating unions—all of which exclude Negroes from membership and four of which (Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen & Enginemen, Brotherhood of Railroad Trainmen and Order of Railway Conductors) have a record of persistent hostility to the use of Negroes as brakemen or firemen on *this very carrier* property (R. 45-47; and see further petitioner's main brief).

In addition, petitioner attaches Exhibit "B" which brings the case directly within the text of *Steele* v. *L & N R. Co.*, 323 U.S. 192 at p. 206. Exhibit "B" which petitioner asks the Court to take judicial notice of shows that May 19, 1949 the five operating unions and the three regional carriers' committees for the National Railroad Adjustment Board made an agreement to establish two supplemental boards of four men each to relieve the congestion of cases before the First Division, to take over any cases which might be assigned them by the First Division under the Railway Labor Act section 3 First (w), 45 U.S.C. Section 153 First (w) (quoted in petitioner's main brief, p. 51). Labor

---

[2] Exhibits A and B hereto are taken from the files of the National Mediation Board and certified correct under its seal and the signature of its Secretary. Section 5 Third (f) of the Railway Labor Act, 45 U.S.C. sec. 155 Third (f), provides:

> "When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective."

In practice this has been construed by the industry as requiring the filing with the National Mediation Board of all rules and regulations adopted under the Railway Labor Act governing the working conditions of employees, as well as formal agreements.

representation on these two supplemental boards is

> (1) on the first supplemental board: the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen & Enginemen
>
> (2) on the second supplemental board: the Order of Railway Conductors and the Brotherhood of Railroad Trainmen.

Since the dispute involves braking functions, the Negro trainporters would be sent to the second supplemental board. This brings the Steele case into play because

> ". . . .the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy. *Cf. Tumey* v. *Ohio*, 273 U.S. 510, 71 L. ed 749, 47 S. Ct. 437, 50 A.L.R. 1243" (loc. cited at p. 206).

It is respectfully submitted that the due process clause of the Fifth Amendment to the Federal Constitution, and the Federal Civil Rights Act (8 U.S.C. sec. 41) would be sacrificed and obliterated if the Negro head-end passenger brakemen (trainporters) had to submit their right to continue in their common calling and to continue to perform their present braking duties on the head-end of respondent's passenger trains to either the First Division or the supplemental boards for interpretation of their working agreement with the carrier. If such an imposition would not obliterate the constitutional and civil rights mentioned, then Negro operating employees must resign themselves to be eliminated from railroad service under abuse of government authority.

There is another item in which the judgment of the

Missouri Supreme Court in this case is patently wrong. In *Howard* v. *Thompson*, 72 F. Supp. 695 the United States District Court for the Eastern Judicial District of Missouri had found that a notice which this carrier had served on its Negro trainporters March 9, 1946 abolishing all trainporter positions effective April 1, 1946 violated the Railway Labor Act as being a change in the working conditions of the trainporters as a class without giving them a 30-day notice provided in Section 6 of the Railway Labor Act (45 U.S.C. sec. 156), and issued a permanent injunction against the carrier abolishing such positions under such notice. The Missouri Supreme Court found in this case that the five-day notices served on the Negro trainporters here were part of the same scheme and violated the Railway Labor Act. (R. 79) Nevertheless in spite of the finding of violation of the Railway Labor Act the Missouri Supreme Court restricted petitioner to enjoining the operation of such notice only "until the Boards established by the Railway Labor Act have decided the jurisdictional dispute, and the representation and classification matters, or for a reasonable time for their jurisdiction to be invoked." (R. 79) At least, petitioner was entitled to give permanent relief against this patent violation of the statutory right created in Section 6 by Congress; and the judgment of the Missouri Supreme Court should be reversed.

II.

The petition is not premature.

It is respectfully submitted that the objection that the petition is premature is frivolous. The Negro trainporters are not required to await the decision of the First Division before complaining. If they submitted to the jurisdiction they would waive their objections as to prejudice.

The basic complaint of the Negro trainporters is that as far as they are concerned the First Division and the supplemental boards are the administrative equivalent of

"coram non judice," and they cannot be forced to submit their claims to such tribunals.

Imminent wrong is threatened. Even the Missouri Supreme Court recognizes this by approving the temporary injunction against the displacement of the Negroes from their jobs (R. 79). The Missouri Supreme Court has charted a mandatory course of procedure which amounts to a present and certain confiscation of their rights. To argue that the complaint is premature is to have a double standard of justice and not to accord equal justice under law.

CONCLUSION

It is apparent from the record that the operating unions are trying to establish a racially closed shop among operating employees on this respondent carriers' property against the clear command of the Railway Labor Act establishing an open shop policy. The Negro trainporters have an equal right under the Federal Civil Rights Act to follow their calling and continue in their employment as operating employees. The Courts must take jurisdiction to protect them against the obliteration and sacrifice of their constitutional and statutory rights.

Respectfully submitted,

VICTOR PACKMAN,
HENRY D. ESPY,
CHARLES H. HOUSTON,
JOSEPH C. WADDY,
Attorneys for Petitioner

APPENDIX

EXHIBIT A

"Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board provided for in the Amended Railway Labor Act, Effective June 21, 1934."

NATIONAL MEDIATION BOARD

WASHINGTON

CERTIFICATION

To Whom It May Concern:

I, Thomas E. Bickers, Secretary of the National Mediation Board, do hereby certify that the attached copy of document described as follows:

"Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board provided for in the Amended Railway Labor Act, Effective June 21, 1934."

is a true and complete copy of the original rules which are on file in the office of the National Mediation Board, which is a public office of the United States not pertaining to a court.

In witness whereof, I have hereunto affixed the official seal of the National Mediation Board and subscribed my name at Washington, D. C., this 23rd day of September, 1949.

(Seal)

/s/ T. E. BICKERS
THOMAS E. BICKERS, *Secretary*

COPY

Rules to Govern the Selection of Labor Members of the National Railroad Adjustment Board Provided for in the Amended Railway Labor Act, Effective June 21, 1934.

Pursuant to instructions your committee submits the following as its report and recommendations in respect to the rules under which the labor members of the National Railroad Adjustment Board, created by the Railway Labor Act as amended June 21, 1934, shall be selected:

Our investigation discloses that the following national labor organizations were organized in accordance with the provisions of Section 2 of the Railway Labor Act as amended and are the qualified organizations to participate in the making of rules and the selection of the labor members of the adjustment board. We have grouped these organizations in conformity with the several divisions of the adjustment board as defined in the Act as amended:

Division 1—Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen and Enginemen
Order of Railway Conductors
Brotherhood of Railroad Trainmen
Switchmen's Union of North America

Division 2—International Association of Machinists
International Brotherhood of Boilermakers Iron Ship Builders and Helpers of America
International Brotherhood of Blacksmiths, Drop Forgers and Helpers
Sheet Metal Workers' International Assn.
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America
International Brotherhood of Firemen & Oilers

Division 3—The Order of Railroad Telegraphers
American Train Dispatchers' Association
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employees
Brotherhood of Railroad Signalmen of America
Order of Sleeping Car Conductors
International Brotherhood of Teamsters, Chauffeurs & Stablemen of America

Division 4—National Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Assn.
International Longshoremen's Association
International Seamen's Union of America

(1) Nominees for membership on each division of the adjustment board shall be restricted to the organizations representing employees in said division and no organization shall be permitted to nominate more than one candidate for membership thereon. Such nominations shall be made through the chief executive of each of said organizations or such other medium as each organization shall designate; provided, however, that when the number of qualified organizations representing the employees embraced in any division of the adjustment board are equal to the number of labor members on that division, then each such organization acting through its chief executive or other medium designated by the organization shall appoint one member to that division of the board.

(2) Except as provided in the preceding paragraph, each nominee for membership on the National Adjustment Board shall be qualified to serve on said board when confirmed by a majority of all the qualified organizations, each acting through its chief executive or other medium designated

by the organization; each qualified organization being entitled to one vote.

(3) In the case of a permanent or temporary vacancy on the adjustment board, such vacancy shall be filled by selection in the same manner as in the original selection.

(4) These rules may be revised at any time by a majority of the qualified organizations.

The above rules were adopted at Chicago, Ill., June 29, 1934.

EXHIBIT B

Memorandum dated May 9, 1949, executed by the Chief Executive Officers of the Five Operating Organizations and the Three Regional Carriers' Committees for the National Railroad Adjustment Board setting up two supplemental boards of four men each with authority to handle cases on the docket of the First Division of the National Railroad Adjustment Board and such additional cases as may be assigned to them by such Division.

NATIONAL MEDIATION BOARD

WASHINGTON

CERTIFICATION

To Whom It May Concern:

I, Thomas E. Bickers, Secretary of the National Mediation Board, do hereby certify that the attached copies of Memoranda dated May 19, 1949, executed by the Chief Executive Officers of the Five Operating Organizations and the Three Regional Carriers' Committees for the National Railroad Adjustment Board (1) setting up two supplemental boards of four men each with authority to handle cases on the docket of the First Division of the National Railroad Adjustment Board and such additional cases as may be assigned to them by such Division, and (2)* recommending certain changes in rules of the First Division with respect to ex parte submissions, are true and complete copies of the original memoranda which are on file in the Office of the National Mediation Board, which is a public office of the United States not pertaining to a court.

In witness whereof, I have hereunto affixed the official seal of the National

* No. 2 omitted here as irrelevant.

Mediation Board and subscribed my name at Washington, D. C., this 23rd day of September, 1949.

(Seal)

/s/ T. E. Bickers
Thomas E. Bickers, *Secretary*

COPY 5/19/49

MEMORANDUM

The chief executive officers of the five operating organizations and the three regional carriers' committees for the National Railroad Adjustment Board are agreed on the following procedure:

Two supplemental boards of four men each will be set up under the provisions of Section 3 First (w) of the Railway Labor Act with authority to handle cases now on the docket of the First Division of the National Railroad Adjustment Board, assigned to them by such First Division, and such additional cases as may be assigned to them by such Division, as hereafter provided. One board shall consist of one representative each appointed by the Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen, and two representatives appointed by the Carriers. The other board shall consist of one representative each appointed by the Order of Railway Conductors and Brotherhood of Railroad Trainmen, and two representatives appointed by the Carriers.

It is understood that the members on such boards may be changed from time to time. Representatives from any railroad involved in cases assigned to such boards may be appointed as board members to handle cases coming from that railroad and members may be changed from time to time as the cases involve different railroads.

Initially, in assigning cases to such supplemental boards, the First Division shall assign cases which have not been certified for appointment of a referee involving any railroad system where ten or more cases are on the docket as

as of the date of the appointment of such supplemental boards, involving employes represented by either or both of the Organizations on each board respectively. Example: If the "A" railroad has seven cases involving the B of L E and four cases involving the B of L F & E they will be assigned to the supplemental board on which representatives of those two organizations serve. The same example is applicable to the O R C and B of R T.

Thereafter, from time to time the First Division shall assign to such supplemental boards cases involving a railroad system whenever ten or more cases are docketed, in the same manner as described in the preceding paragraph.

Cases where the interest of an organization not represented on such supplemental board is asserted by either party or by a member of the First Division, shall be retained by the First Division and shall not be assigned to such supplemental board.

It is agreed that such supplemental boards shall be established for a period of one year, and thereafter subject to termination upon request of the chief executive officers of the five operating organizations or the three regional carrier committees upon ninety days' notice.

/s/ A. JOHNSTON,
Grand Chief Engineer,
Brotherhood of Locomotive Engineers

/s/ D. B. ROBERTSON,
International President,
Brotherhood of Locomotive Firemen and Enginemen

/s/ H. W. FRASER (ROH),
President.
Order of Railway Conductors

/s/ D. M. MACKENZIE,
Assistant President,
Brotherhood of Railroad Trainmen

/s/ A. J. GLOVER,
President,
Switchmen's Union of North America

/s/ H. A. ENOCHS,
Chairman,
Eastern Committee for the National Railroad Adjustment Board

/s/ D. P. LOOMIS,
Chairman,
Western Committee for the National Railroad Adjustment Board

/s/ C. A. MACKAY,
Chairman,
Southeastern Committee for the National Adjustment Board

Witness:

/s/ FRANCIS A. O'NEILL, JR.,
Chairman, National Mediation Board

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CHARLES ELMORE CROPL
CLER

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 269.

HARRY F. RUSSELL, Judge of the Circuit Court of the City of St. Louis, Missouri,
Petitioner,

vs.

THE STATE OF MISSOURI, at the Relation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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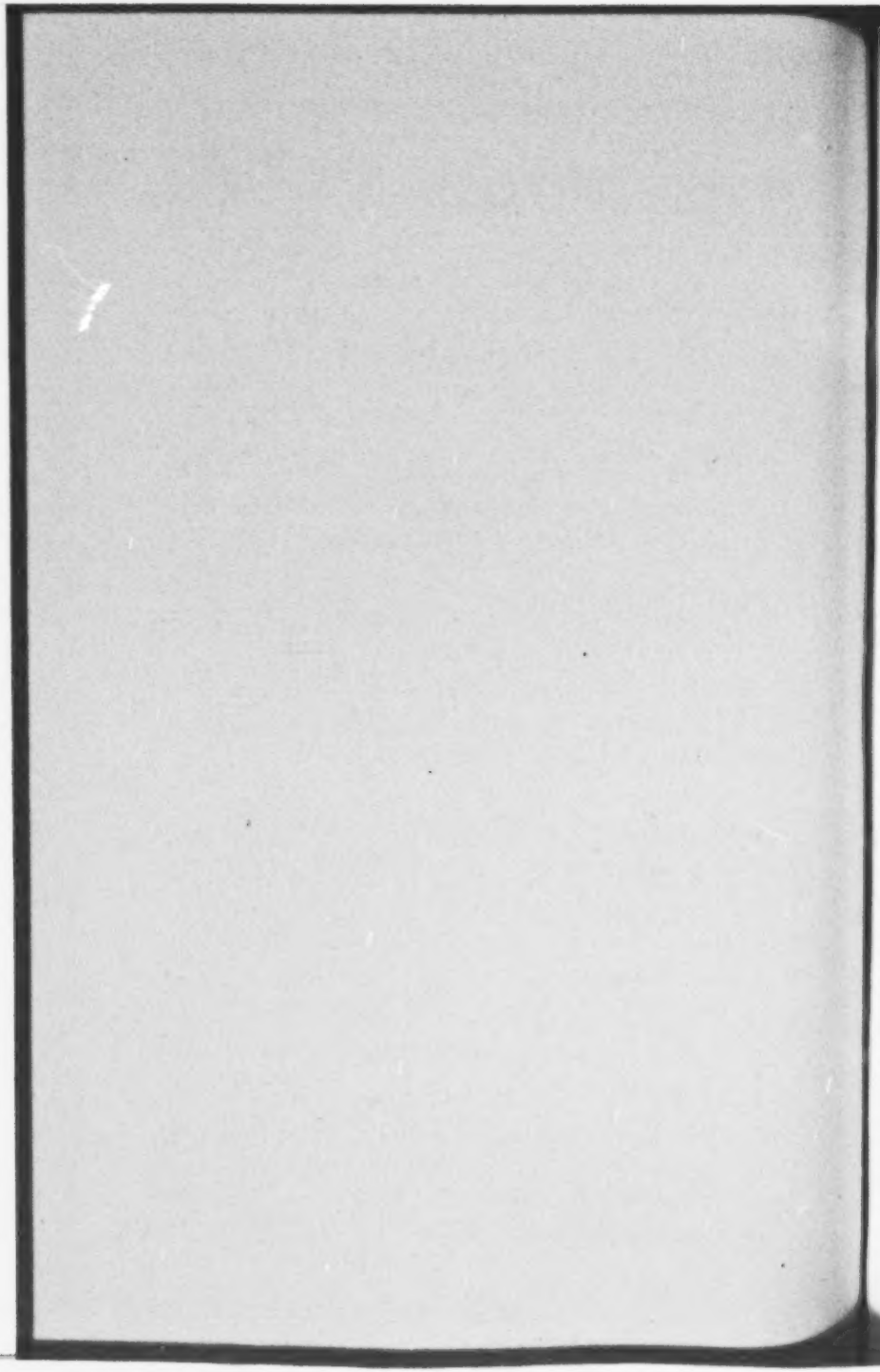

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT ST. LOUIS-SAN FRANCISCO RAIL WAY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

Respondent, St. Louis-San Francisco Railway Company (who will hereinafter be referred to as Frisco), is a common carrier by railroad and an employer of many crafts or classes of employes with whom it has collective bargaining agreements entered into between it and the collective

bargaining representatives of such crafts or classes pursuant to the Railway Labor Act of 1934, 45 U. S. C. A., sec. 151 et seq. Among these are brakemen and brakemen-baggagemen covered by collective bargaining agreement with Brotherhood of Railroad Trainmen (R. 18), and train porters covered by collective bargaining agreement with a union of their own choosing (Howard v. Thompson, 72 F. Supp. 695, 698, 699, 700, referred to in the decision below, R. 74, 219 S. W. 2d 340, 342).

The Howard case resulted from an agreement made with the Brotherhood of Railroad Trainmen providing that effective April 1, 1946, the practice of train porters performing work commonly recognized as brakemen's duties will be discontinued. When the Frisco attempted to place this agreement into effect, a restraining order was issued. Appeals from the decision therein was taken by plaintiffs and the Frisco to the United States Court of Appeals for the Eighth Circuit, bearing that Court's Nos. 13,899 and 13,900. The appeal of the Frisco is limited to the holding of the lower court that the Frisco was required under the Railway Labor Act (45 U. S. C. A. 152—seventh and 156) to give 30 days' notice to the train porters. The holding by the Supreme Court of Missouri in the case below rules, in substance, to the same effect. Oral argument in the Howard Case was had on September 16, 1949.

The scope of the instant case is narrow by comparison with that involved in the Howard Case and the Tillman and Bibbs cases referred to on page 21 of the petition herein, and is distinguishable in fact. In the Howard Case, the Frisco, as a result of an agreement with the Brotherhood of Railroad Trainmen, undertook to discontinue all train porter positions (Howard Case, 72 F. Supp. 695, 699).

In the instant case, Frisco, in order to care for its employment needs on trains Nos. 9 and 10, on and after May

14, 1948, posted bulletins for "brakemen-baggagemen" and also "chair car porters" (Opinion below, R. 73). This meant that the head-end braking work (previously performed by train porters as part of their duties) on said trains would be performed by an employee of the brakeman class, who would also handle baggage on said trains; and that the remainder of the work performed by train porters would be performed by the "chair car porters."

The arrangement was not put into effect because of the restraining order issued May 13, 1948, by Harry F. Russell, Judge, Circuit Court of City of St. Louis, Missouri (R. 10-11), as a result of petition filed in said court on the same day by J. V. Bagley and Cleveland Tillman, plaintiffs, against Frisco, defendant, and the subsequent temporary injunction issued by said Judge on July 17, 1948 (R. 13-14).

POINTS OF FACT AND OF LAW AND GROUNDS URGED IN ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

A jurisdictional labor dispute exists and the Supreme Court of Missouri properly held that such dispute was not determinable by the courts.

General Committee, etc., v. Missouri-Kansas-Texas R. Co. (C. C. A. 5), 132 F. 2d 91, 94, 320 U. S. 323, 334-335;

Order of Railway Conductors v. Pitney et al., 326 U. S. 561;

Order of Railroad Telegraphers et al. v. New Orleans, Texas & Mexico Ry. Co. et al. (C. C. A. 8), 156 F. 2d 1, cer. den. 329 U. S. 758;

Missouri-Kansas-Texas R. Co. v. Randolph (C. C. A. 8), 164 F. 2d 4, cer. den. 334 U. S. 818.

II.

The Railway Labor Act has been upheld as constitutional, and the forebodings as to possible adverse decision if matter is submitted to National Railroad Adjustment Board are not proper grounds for judicial review.

45 U. S. C. A. 151 et seq.;

Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515;

Washington Terminal Co. v. Boswell, 124 F. 2d 235, affmd. 319 U. S. 732-733;

Hampton v. Thompson (C. C. A. 5), 171 F. 2d 535, 538;

Order of Railway Conductors v. Swan, 329 U. S. 520.

ARGUMENT.

I.

The Supreme Court of Missouri Properly Held That a Jurisdictional Labor Dispute Existed and That Such Dispute Was Not Determinable by the Courts.

The record in a proceeding in prohibition is somewhat meager (as here), since the determination of whether prohibition lies is based primarily on the pleadings and orders therein. Enough is, however, contained therein to clearly indicate the existence of a jurisdictional dispute.

The Bill in Equity contains the following specific allegations:

> "10. Plaintiffs state that it is the intention of the defendant railroad, effective with the first run of Train No. 9 from St. Louis on May 14, 1948, to relegate plaintiffs and others similarly situated on runs 9 and 10 to pure menial work, and to fulfill an arrangement made with the white Brotherhood of Railroad Trainmen to turn over the head-end brakemen jobs to white men on other runs as well; that once white men take over as baggage-brakemen on runs now handled by so-called 'train porters' and perform the functions of plaintiffs and others similarly situated, they will insist upon such jobs as a matter of right and as recognition of their claim that white men who are called 'brakemen' are entitled exclusively to braking jobs despite the fact that both white and negroes perform and are capable of performing the same work" (R. 7).

Additionally, in the Motion to Intervene, filed by the General Chairman of the Brotherhood of Railroad Trainmen in the trial court, it is stated:

"3. Applicant states that it is now and at all times has been the settled policy of the Brotherhood of Railroad Trainmen that in the employment of brakemen and baggagemen by the defendant Railway, only such persons may be employed who are covered by the contracts in force between the Brotherhood of Railroad Trainmen and said Railway and who are entitled to such employment by their seniority as provided in said contracts. That this is in accord with the common practice in the railroad industry and is generally recognized and followed by defendant Railway Company. That Plaintiffs, on this action, seek to have the Court order and decree that they, and others similarly situated, are entitled to such employment contrary to the rights of this Applicant and the entire membership of the Brotherhood of Railroad Trainmen as established by contract and custom."

"5. Applicant states that he is a necessary party to this action and that his intervention herein is indispensable to the preservation of his rights and the rights of the Brotherhood of Railroad Trainmen" (R. 18-19).

It is clear from these pleadings, the facts contained in the opinion below (R. 77-78), and the facts contained in the Howard case, supra, that two groups of Frisco employees ("brakemen" on the one hand and "train porters" on the other) are vieing with each other and their employer for the right to perform certain work, i. e., the braking work and the handling of baggage at the head-end of Frisco trains Nos. 9 and 10.

This is a so-called jurisdictional dispute, where the claimed rights of two crafts overlap, necessitating "a determination of the point where the authority of one craft ends and the other begins." General Committee, etc. v.

Missouri-Kansas-Texas R. Co. (C. C. A. 5), 132 F. 2d 91, 94; 320 U. S. 323, 334-335.

In Order of Railway Conductors v. Pitney, et al., 326 U. S. 561, this Court had under consideration a "jurisdictional dispute involving the railroad and two employee accredited bargaining agents." Each union claimed that its agreement entitled it to supply conductors for five daily freight trains operated within a yard of the railroad. The O. R. C. represented road conductors, who ordinarily operate trains outside the yards and the Brotherhood of Railway Trainmen (B. R. T.) represented yard conductors, who ordinarily operate trains inside yards. Over years the practice has been that at times yard conductors manned some trains outside the yards and road conductors manned some trains within the yards. In 1940 the railroad agreed that thereafter only road conductors would man the outside trains; however, O. R. C. conductors continued to man the five trains inside the yard. In 1943 "the railroad was prevailed upon by the B. R. T. to agree to substitute B. R. T. yard conductors for the O. R. C. conductors operating these five trains."

The O. R. C. brought suit to enjoin the carrying out of that arrangement. At page 566 of the opinion, the Court said:

> "* * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. See Brown Lumber Co. v. L. & N. R. Co., 299 U. S. 393, 396. Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285, 291. For O. R. C.'s agreements with

the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. See Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483-484; Burford v. Sun Oil Co., 319 U. S. 315. Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand. Lawrence v. St. Louis-San Francisco R. Co., 274 U. S. 588, 592-3, and other cases cited in Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 51, n. 9; Natural Gas Co. v. Slattery, 302 U. S. 300.

"* * * But the court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad. * * *"

Order of Railroad Telegraphers et al. v. New Orleans, Texas & Mexico Ry. Co. et al., (C. C. A. 8), 156 F. 2d 1, also involved a jurisdictional dispute. There the O. R. T. and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (B. R. C.) were accredited bargaining agents for their respective crafts. The controversy concerned the interpretation and

application of collective bargaining contracts of the two unions to positions and work performed by the telegraphers' craft on the one hand and the Clerks' craft on the other. The O. R. T. contended that the telegrapher craft may do both telegraphic and clerical work while the B. R. C. contended that, except for clerical work incidental to certain positions, all clerical work is covered by its contracts. The boundary line between the functions of the two crafts was not clearly defined in the contracts.

The O. R. T. brought action for declaratory judgment and for injunctive relief against the taking away of work from its members. The District Court dismissed the petition, 61 F. S. 869, and plaintiffs appealed. The Circuit Court found that if the contracts were to be interpreted and applied as the unions claimed, l. c. 3:

> "then the jurisdiction of the two unions overlap and there exists an undetermined zone of clerical work at the stations on the lines of the defendant carriers jurisdiction over which is claimed by each union and which is the subject of this controversy."

Following the doctrine of the Pitney case, supra, the Circuit Court held, l. c. 5:

> "The judgment dismissing both Counts of the petition will be vacated and the court is instructed to stay its decision until a reasonable opportunity is given for an application to the Adjustment Board for an interpretation of the telegraphers' agreement, and the case is remanded for such further proceedings as the facts may warrant."

Certiorari was denied by this Court (329 U. S. 758).

The doctrine in the Pitney case was also followed in Missouri-Kansas-Texas R. Co. v. Randolph (C. C. A. 8), 164 F.

2d 4, certiorari denied, 334 U. S. 818, a case involving train porters' claims to certain passenger train work.

The Supreme Court of Missouri, therefore, properly held that a jurisdictional labor dispute existed and that such dispute was not determinable by the courts.

II.

The Petition Is Based on Forebodings as to the Possible Decision of the National Railroad Adjustment Board if the Matter Is Submitted to That Body.

The Railway Labor Act, 45 U. S. C. A. 151, et seq., has been held to be constitutional as a valid exercise of congressional power to regulate interstate commerce. Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515. See also Washington Terminal Co. v. Boswell, 124 F. 2d 235, affirmed per curiam by an equally divided court, 319 U. S. 732-733.

A study of the petition clearly shows that it is based on forebodings of "things to come". It is bottomed on the premise that if the matter is submitted to the National Railroad Adjustment Board plaintiffs below, as well as other train porters employed by Frisco, will be denied certain claimed constitutional and statutory rights, because the First Division of that Board is so "geared and manned" (Pet. p. 22).

Congress, in enacting the Railway Labor Act, provided that the Adjustment Board should consist of thirty-six members, eighteen of whom are to be selected by labor organizations of employes "national in scope" [45 U. S. C. A. 153-First (a)]. Of these, five were assigned to the First Division of that Board [Subsec. (h) idem.]. The Third Division of that Board, for instance, has 5 employe

representatives selected by "national organizations". It has jurisdiction over many groups of employes, and according to the Fourteenth Annual Report of the Mediation Board for the Fiscal year ended June 30, 1948 (page 75), ten different unions were parties to cases docketed in that division. Obviously, 5 of such unions had no representation on that Division. That same report indicates that the Second and Fourth Divisions, having 5 and 3 employe members, respectively, have cases docketed by more unions than have representatives on the Division (Idem. pp. 73, 76). The report as to the First Division does not state this information as to "unions" docketing cases before that division. But it becomes obvious that the situation here complained of, i. e., that plaintiffs' collective bargaining representative or union has no representation on the Board, is not unique.

Prejudice, because of union affiliation, is alleged against the employe members of the First Division (Pet. pp. 20, 34 et seq.). This emphasizes the anticipatory character of the grounds on which certiorari is here sought. Such grounds are untenable. cf. Hampton v. Thompson, C. C. A. 5, 171 F. 2d 535, l. c. 538-539.

On page 21 of his petition, petitioner (footnote 8) states that challenge has been filed with the First Division and that if the challenge is denied, the action of the Division "will have to be attacked collaterally by the extraordinary writs". Further, if the challenge is upheld, then, it is alleged the "state of administrative frustration" will be reached.

When that state of "frustration" has been reached, **and not before**, is the appropriate time for judicial action. cf. Order of Railway Conductors v. Swan, 329 U. S. 520. In that case, the question to be resolved was whether the First

Division or the Fourth Division had jurisdiction of dispute involving yardmasters. Said the Court, l. c. 524-525:

> "In other instances, **we have left the problem of jurisdiction to be determined in the first instance by the administrative agency.** Myers v. Bethlehem Corp., 303 U. S. 41. But here both the First and the Fourth Divisions of railroad and labor representatives, appear hopelessly divided on the jurisdictional issue, making a determination impossible. **Judicial guidance at this state is justified as long as such a condition exists.**" (Emphasis supplied.)

Nor is there here present an "obliteration of Federal civil rights and job rights established under the Railway Labor Act," since the Missouri Supreme Court kept plaintiffs in status quo by permitting the temporary injunction to remain in effect,

> "enjoining taking away from plaintiffs their present job functions on any trains or replacing them with baggagemen-brakemen, which may be continued pending determination of the jurisdictional, classification and representation questions by the Boards established by the Railway Labor Act or for a reasonable time to invoke the jurisdiction of those Boards" (R. 80-81).*

Clearly, the state of administrative frustration and the denial of constitutional and statutory rights are *in futuro* and not *in praesenti*, stamping recourse to this court as premature on that premise.

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* This part of the holding is based on the failure to give 30 days notice under the Railway Labor Act (R. 79). Respondent does not agree with that premise. A similar holding in the Howard Case, supra, is the sole subject matter of Frisco's appeal therein. That appeal was pending at the time of the decision below, and is still pending, before the United States Court of Appeals for the Eighth Circuit.

CONCLUSION.

Wherefore, it is respectfully suggested that the petition for writ of certiorari herein be denied.

Respectfully submitted,

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